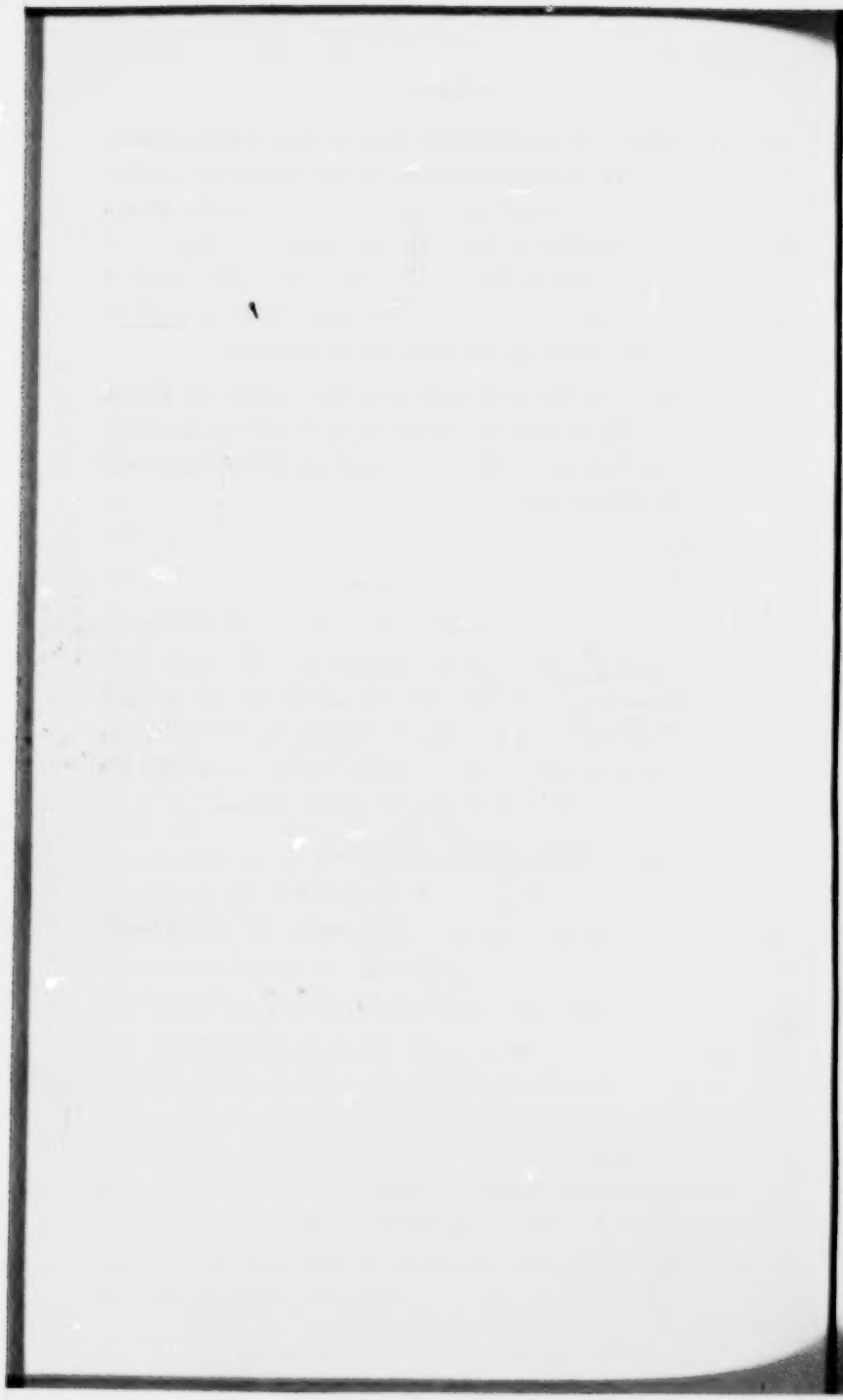

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

Nos. 368 - 370

LOUIS H. ROSENBLUM,
Petitioner, Appellant below,
vs.
UNITED STATES OF AMERICA,
Respondent, Appellee below.

MAX STRYK,
Petitioner, Appellant below,
vs.
UNITED STATES OF AMERICA,
Respondent, Appellee below.

JACOB WEISS,
Petitioner, Appellant below,
vs.
UNITED STATES OF AMERICA,
Respondent, Appellee below.

SEPARATE AND SEVERAL PETITION AND BRIEF FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Republic Bank Building,
Dallas, Texas,
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IN THE

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Nos. .....

LOUIS H. ROSENBLUM,
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Petitioner, Appellant below,
vs.

UNITED STATES OF AMERICA,
Respondent, Appellee below.

SEPARATE AND SEVERAL PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Your petitioners, Louis H. Rosenblum, Max Stryk and Jacob Weiss, hereinafter designated as defendants, sep-

arately and severally petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review and reverse the decision of that Court of June 13, 1949 (petition for rehearing overruled August 24, 1949), affirming the judgments of the District Court of the United States for the Southern District of Indiana, convicting each defendant of a violation of Section 145(b), Internal Revenue Code, Title 26, U. S. C. A., in the case against each defendant as above entitled, and each respectfully represents as follows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. By a separate indictment against each defendant, the Grand Jury in the Southern District of Indiana, Indianapolis Division, on the 19th day of September, 1947, charged each defendant separately with attempting to defeat and evade a large part of his income and victory tax for the calendar year 1943, by filing and causing to be filed with the Collector of Internal Revenue, at Indianapolis, Indiana, a false and fraudulent income and victory tax return by understating the amount of his income as therein specifically set out. (Rosenblum, R. 3, 4; Weiss, 5, 6; Stryk, 7, 8.)

2. For example, in the indictment against Rosenblum (R. 3, 4), the Grand Jury specifically charged that his net income for said calendar year was $210,397.21,

"derived as follows:

Gross Income:		
Salary	$ 34,562.50	
Dividends	145,022.72	
Interest on Government obligations	285.86	
Capital Gain	28,715.60	
Other Income	4,109.97	
Total Income		$212,696.65",

from which certain itemized deductions were subtracted, leaving the alleged net income of $210,397.21, upon which it was charged that he owed a tax of $157,760.36.

3. The three indictments in form were identical as that set out for Rosenblum in 2 above, except for the immaterial variances as between the three defendants in the amounts of gross income and deductions. (R. 3-7.) There was no charge as to Weiss that he had received any unreported "Capital Gain" and the Government completely abandoned the charge of "Capital Gain" contained in the Rosenblum and Stryk indictments and this item is not an issue in these proceedings. (R. 53, 56, 87, 88.)

Each of the defendants, on or before March 15, 1944, had filed separate individual income tax returns (Government's Exhibits A-1, A-2 and A-3) for the year 1943. (R. 85.) The itemization in the individual tax returns was identical with the breakdown in the separate indictments, with the only material difference between the returns as filed and the three indictments being the addition in the indictments of the item of "Dividends" in the amount stated.

4. On motion, the Court ordered the United States Attorney to file a bill of particulars as to each indictment, and to show therein

(1) The name or names of the corporation or corporations from which the alleged dividends had been received?

(2) The date of the payment or the receipt of such dividends?

(3) Whether such dividends consisted of money, in kind, stock or other evidence of benefit?

(4) How is it determined that the figure or figures is or are dividends, that is, did the corporation or corporations have earnings or profits sufficient to justify the amount it paid and at the time it paid the alleged dividend or dividends?

and

> (5) As to Rosenblum and Stryk—what sale, transfer or exchange gave rise to the item of "Capital Gain" included in the alleged gross income charged in the respective indictments? (R. Rosenblum, 36, 37, 52; Weiss, 40, 41, 52; Stryk, 44, 45, 52.)

5. In response, the Government's Bills of particulars informed the defendants that *no corporate dividends* were received by any of the defendants, and that no effort to prove dividends received from a corporation would be made on the trial against any of the defendants, and that no capital gain would be shown or proven to have been received by either Rosenblum or Stryk. (Rosenblum, R. 53; Weiss, R. 54, 55; Stryk, R. 55, 56.)

In the Bills of particulars, the United States Attorney further stated that "The word 'dividends' used in the indictment is used in its broad sense of a division of money among two or more people," and that the money described as dividends in the indictment represents a division of money received by the defendant from a joint venture in which he and the other defendants had participated. (R. 53, 54, 55.) In explanation of this, the United States Attorney informed the trial court (R. 257, 258): "The Grand Jury could not have been charging them with getting dividends because people who are not stockholders can't get dividends of corporations, and the Grand Jury knows that. * * * Now, it is my contention that the Grand Jury, knowing that these men were not stockholders of the corporation (except defendant Stryk was a stockholder of one of the corporations) used the word in the common language, and I don't think there is any objection to doing that."

6. At the trial, the Government admitted that there was no falsity in the tax return of any defendant except as to the item of "Dividends" shown in each indictment in the breakdown of "Gross Income". (R. 87, 88.) It ad-

mitted that it had no evidence to prove that either Rosenblum or Stryk had received any "Capital Gain" which they did not report. (R. 87, 88.)

The Government also admitted and announced at the commencement of the trial that it did not intend to charge the defendants with the receipt of "Dividends" from any corporations which they did not report. (R. 87, 88.)

The defendants thereupon moved the trial court to find for the defendants upon such admissions. (R. 88, 89.) The court denied such request. (R. 89.)

7. At the close of the Government's evidence, and before the defendants had rested, the trial court at R. 255-259, in discussing the charge in the indictments, the receipt of "Dividends", and the nature of the proof offered by the Government as to money collected, stated at R. 259, "• • • can it be said that those moneys thus collected amounted to dividends?"

"Now, that becomes a very material question upon the substantive counts."

At R. 261, in discussing what is, and what is not a dividend as defined by the income tax statute, the trial court, in response to defendants' insistence that there was an entire failure of proof as to the receipt of "Dividends" as defined by the Internal Revenue Code, stated: "Well that is the question of the case."

At R. 262, while the separate motions for acquittal were pending, the trial court further said that he preferred not to pass upon these motions at this stage of the proceedings.

8. After the Government had abandoned the offense charged in the indictments (the receipt of dividends) the Government, over the objections of the defendants (R. 88, 89, 255, 256, 257, 258 and 259), proceeded to try the defendants for the receipt of money in a "Joint Venture." (Opin-

ion of trial judge, R. 276; Opinion of Circuit Judge Kerner, R. 392; Opinion of Chief Judge Major, R. 398.)

9. The testimony of Government witnesses, supplemented by the Exhibits received as part of their cross-examination, proved conclusively that in the joint venture defendants suffered a loss and had no net income which they failed to report (Government's Exhibits A-13, A-14 and Defendants' Exhibit 6) and that their individual tax returns as filed in March, 1944, were true and correct (R. 116, 117, 119, 120), that is to say, defendants had no more tax liability than was disclosed by their said returns.

10. The defendants had a complete defense to the charge of having received non-reported dividends. When the Government admitted that the defendants did not receive "Dividends", the defendants did not feel that they were called upon to answer a different charge and one not contained in the indictments. (R. 256, 257.) The opinions of both the trial court and the Court of Appeals show conclusively however that the defendants were found guilty of a charge other than the receipt of net income from unreported "Dividends" (R. 276, 279, 392, 398) and that the trial proceeded upon the alleged receipt of gross receipts from a joint venture. (R. 392, 398.) The trial court held (R. 280): "This was an illegal joint enterprise" and that the theory of trial and the nature and relevancy of the proof mattered not, stating at R. 278, 279:

> "* * * it is impossible to see how they (defendants) could be prejudiced by the government's labeling the income as 'dividends' or 'profits from a joint venture' instead of merely labeling it as 'other income.' Furthermore, I am of the opinion that profits from a joint venture are not inaptly called dividends. The phrase is fully descriptive also of corporate profits divided by the people who in fact own and control the corporation. Any possible prejudice to the defendants is seen to be even more remote if we consider the

fact that defendants' principal defense is that the money received was merely gross income from which they should be allowed to deduct expenses which exceeded the income. If defendants were relying on the government's original theory of joint venture, as they now claim they were, why did not they attempt to rebut the government's case by introducing evidence of the expenses which they assert were incurred in the sale of the whiskey? Such evidence would have been admissible under the joint venture theory, but not under the dividend theory."

11. Despite the structure of the three indictments and the declarations of the United States Attorney that he did not intend to prove the receipt of dividends by the defendants, the Government was permitted over the objections and protests of defendants to go into two whiskey transactions. With one of these, referred to at the trial as the "Beam" transaction, the defendant Weiss had no connection. (R. 393.) Weiss, however, was found guilty of and stands convicted of the receipt of income from this source. (R. 277, 280, 281, 392, 398.) At the trial it was stipulated by the government and the defendants that the money which was not accounted for in the tax returns "were gross amounts received in cash by Louis H. Rosenblum in the transaction from purchasers" of whiskey. (Government's Exhibit Z.)

12. Without going into the details of the whiskey transactions in this Petition, it suffices to point out that the sums received by defendant Rosenblum in the whiskey transactions were *gross income* against which, as provided in Sections 21, 22 and 23 of the Internal Revenue Code, the defendants were entitled to various set-offs and deductions. The whiskey cost the defendants $466,039.32. (Defendants' Exhibit 6.) In computing the alleged tax, the government allowed the defendants no cost for the whiskey. (R. 234.) Expenses were paid out in making the sales

in the sum of $145,506.07 as shown in Government's Exhibits A-13 and A-14 introduced by Government's witness Richardson (R. 121, 122); the Government allowed $8,746.70 of such expenses and disregarded $136,759.37 thereof. (R. 234.) The cost of the whiskey amounting to $466,039.32 and expenses of $145,506.07 totalled $611,545.39 and exceeded the gross receipts and there was no net income from the whiskey transactions.

In the hypothetical question and answers of the Government's tax expert, witness Ruggaber, it was made to appear as though the Government was allowing $25,698.99 of defendants' expenses (R. 234-238), whereas on cross-examination the witness submitted Government's Exhibits Y-1 and Y-2 on which were detailed the items aggregating the gross figures assumed and wherefrom, upon interrogation, it was developed unequivocally (R. 240, 241, 245, 246, and 247), that of the said $25,698.99 only $8,746.70 was allowed as defendants' expenses and that the difference of $16,952.29 was an over-statement of that amount in the $586,178.97 assumed as the gross income of the defendants in the hypothetical question and answer. The questions and answers were objected to by defendants as being incomplete, inaccurate, and failing to assume the Record facts of the defendants' whiskey costs and all of their expenses and that it was incompetent and irrelevant to the indictment charge of "Dividends", and for the further reason that as to defendant Weiss, it assumed and sought to charge him with moneys collected on the "Beam" transactions with which he had no interest or relation.

The finding of guilt overlooks the fact that the only proof in the Record is as to gross receipts. The court disregarded the deductions and refused to give effect to Government's Exhibits A-13 and A-14, the expenses of the defendants in the joint venture, when the Government offered no proof to the contrary and nothing to question the

verity of that which such Exhibits (A-13 and A-14) proved. But if this evidence of cost and expenses is not further substantiated in the Record, the fault lies entirely with the Government. The defendants were not called upon to meet this kind of a charge—and they should not have been penalized, as they were, *after* the trial (R. 279), for failure to go forward with proof which was available and which they were prepared to introduce if they had not been misled by the trial court and the proceedings at the trial. They asserted, and still assert, that upon the trial they were only called upon to defend the offense as set forth specifically in the indictment and could not be compelled to meet a different charge. Since the charge in the indictment was not proved and the Government by its own witnesses and evidence had shown that defendants had no *net* income upon which they failed to pay a tax, the defendants were entitled to rest without introducing further evidence.

13. The trial court encouraged the defendants in their position by holding throughout the trial that there was no issue of fact because there was no evidence to show that defendants received "Dividends"; the Government admitted that the only issue was whether or not the money received by the defendants from a joint venture in whiskey could, as a matter of law, be said to be "Dividends" within Section 115(a) of the Internal Revenue Code; the issue was one of law as to the meaning of the word "Dividends" —and this issue, the court said he would not decide until *after* the evidence was in. (R. 88, 260, 261.) Having decided *after the trial was over* that dividends meant something different from the Congressional definition, due process was denied to defendants and each stands convicted of a charge not laid in the indictments.

The position of the trial court, stated early in the trial, is shown by the following statement:

> "The Court: Of course your objection, Mr. Ward, raises a legal question, and a question which I shall

determine upon all of the evidence. I am not going to pass at this stage of the case, upon this question of what constitutes dividends and what does not constitute dividends under a proper construction of the acts of Congress. That question I shall reserve until the conclusion of the evidence. I see that you are going to have controversy all through this lawsuit about whether anything in the indictment can be reached under the designation of dividends." (R. 89.)

There was no evidence that any corporation had any earnings or profits out of which dividends could have been paid.

14. Concurrent with the return of the foregoing individual substantive indictments against defendants, the Grand Jury returned an indictment charging defendants (R. 8) with having conspired to attempt to evade and defeat income and victory taxes due for the calendar year 1943, by filing and causing to be filed with the Collector at Indianapolis, Indiana, false and fraudulent returns. The conspiracy indictment, over the objections of the defendants (R. 63), was consolidated for trial, upon motion of the District Attorney, with the foregoing individual substantive indictments.

The Court of Appeals reversed all three convictions on the conspiracy indictment. (R. 400, 401, 402.)

The record shows that evidence which was erroneously received on the basis of the conspiracy charge, and which caused the reversal thereof (R. 398 to 402), was erroneously considered and relied upon by both courts below to convict the defendants on the substantive indictments.

The statements by one or another of the defendants, made long after the commission of all acts charged in the indictments or relied upon by the Government as constituting the offenses charged had been completed, were erroneously relied upon and held by both courts below to be

binding upon the other defendants over the separate objections of the several defendants that such statements were hearsay as against the defendant not making them. (R. 88, 89, 95, 145, 151, 162, 170, 193, 214, 223, 225, 229 and 230.)

The vice of this procedure is aggravated by the fact that the trial court failed to differentiate between the proof relevant to the substantive offense and that relevant to the conspiracy charge (R. 399), and the trial court was powerless to prevent the abuse which resulted from getting evidence into the record which was wholly inadmissible on any theory, but which he admitted solely upon the conspiracy charge. (R. 95, 225 and 401.) Such procedure was an abuse of judicial process (R. 400) and destroyed a fair administration of justice to these defendants. (R. 401.)

15. The statement of defendant Rosenblum of March 21, 1944 (Government's Exhibit X-1) relating to "Beam" transactions with which defendant Weiss (R. 393) had no connection—and no interest—was received in evidence against all the defendants (R. 244) notwithstanding the same was made in the absence of both defendants Weiss and Stryk.

The evidence of Siemion (R. 146-150), Ackerman (R. 151), Hicks (R. 155), and Palffy (R. 159), as to records of Gary Wine & Liquor Corporation, and conversations and transactions had by such witnesses with Rosenblum concerning the sale of "Beam" whiskey, all in the absence of Weiss, were admitted over the objection of Weiss that he had no connection with the "Beam" whiskey sales and all of such evidence was hearsay as to him. (R. 95, 145, 151.)

The statements U-1, U-2, U-3, V-1, V-2, V-3, V-4, V-5, A-8, A-9, A-10 and A-11, allegedly made by the different defendants at different times in 1945 and 1946, in connection with settlement negotiations with the Government agents were erroneously received in evidence and relied

upon to convict the defendants. (R. 114, 115, 116, 117, 118, 119, 120, 221, 223, 224, 225, 229, 231, 232, 233, 279, 281, 395 and 396.)

16. The indictments which charged the substantive offense against each defendant did not allege that the defendants had participated in the same act or transaction or in the same series of acts or transactions constituting the separate offenses charged. (R. Rosenblum, 3, 4; Weiss, 5, 6; Stryk, 7, 8.)

17. Trial by jury was waived (R. 72), and trial before Judge Lindley, resulted in conviction of each defendant as to the substantive offense against him and as to the conspiracy charge, and each defendant was sentenced to imprisonment of three years on the substantive offense and fined $10,000.00, and each was given a cumulative sentence of two years and fined $10,000.00 on the conspiracy charge, and assessed with one-third of the costs. (R. Rosenblum 295, 296, 298; Weiss, 296, 298; Stryk, 297, 299.)

18. Each defendant filed a motion for acquittal at the close of the Government's evidence, for the reason that the evidence was insufficient to sustain a conviction against him of the offense charged in the indictment. (R. Rosenblum, 269, 271; Weiss, 270, 271; Stryk, 270, 271.) Such motions were overruled. (R. 271, 272, 273.) A similar motion was filed by each defendant at the close of all the evidence. (R. Rosenblum, 272, 274; Weiss, 272, 274; Stryk, 273, 274.) These were all overruled. (R. 283, 284.) Each defendant filed a motion in arrest of judgment, which was overruled. (R. Rosenblum, 287, 288, 291, 292, 295; Weiss, 289, 294, 296, 298; Stryk, 290, 293, 294, 297.) Each defendant, within five days after judgment, filed a renewed motion for acquittal, which was overruled. (R. Rosenblum, 284, 285, 287, 288, 291; Weiss, 285, 287, 290, 291; Stryk, 286, 287, 291.)

19. Each defendant took a separate appeal from his

judgment of conviction to the Court of Appeals for the Seventh Circuit; notice of such appeal, statement of points, and supersedeas bond having been made and filed on August 23, 1948. (R. Rosenblum, 300 to 309, bond, 357-358; Weiss, 309 to 318, bond, 359-360; Stryk, 319 to 328, bond, 362-363.)

20. By written stipulation, approved by the Court of Appeals, all of the cases were presented upon the one printed Record and the printing of the exhibits dispensed with. (R. 380, 381.) The defendants herein have accordingly caused this petition to be accompanied by one certified transcript of Record in the cases, including the proceedings in said Court of Appeals.

21. In the Court of Appeals for the Seventh Circuit the cases were heard by Chief Judge J. Earl Major and Circuit Judges Otto Kerner and F. Ryan Duffy; each judge wrote a separate opinion, a copy of which, for convenience, is set out in the Appendix to the brief filed in support of this petition as Exhibit "A".

II.

BASIS OF THIS COURT'S JURISDICTION.

The judgment of the Court of Appeals affirming the judgment of conviction of each defendant was rendered on June 13, 1949. (R. 403, 404, 405.) Each defendant filed a petition for rehearing in said Court on June 23, 1949. (R. 405.) Each petition for rehearing was denied by the Court of Appeals on August 24, 1949. (R. 406.)

On September 20, 1949, Mr. Chief Justice Fred M. Vinson, for cause shown, upon the application of counsel for defendants, ordered that the time for filing petition for certiorari in these causes be extended to and including October 7, 1949.

The jurisdiction of this Court is invoked under Section 1254(1), Title 28, United States Code, Judiciary and Judicial Procedure, Effective September 1, 1948.

This petition is presented by the separate and several petitioners who were defendants in, and parties to, the said criminal causes as hereinbefore set out.

III.

QUESTIONS PRESENTED.

One.

Serious error was committed in convicting the defendants of a charge not contained in the indictments. Failure to give an accused notice of the precise offense to be met—the heart of due process—cannot be argued away as mere differences in verbiage. The trial court thought likewise during the trial—and the seriousness of the error is pointed up by him in the following sentence from his decision—"Such evidence would have been admissible under the joint venture theory, but not under the dividend theory." (R. 279.) This is precisely what the defendants believed—and they made timely objections to the introduction of evidence at variance with the indictment—and refused to be drawn into a trial of a different offense.

Two.

There was an utter failure of proof of corpus delecti. The conviction of each of the defendants of the charge made against him was serious error. No competent evidence was introduced showing that any of the defendants had a net income for 1943 upon which he did not pay the proper tax. The defendants suffered a loss in their 1943 whiskey transactions. The Court of Appeals erred in not ordering the discharge of each defendant upon his several motions for acquittal.

Three.

It was prejudicial to the substantial rights of defendant Weiss to receive and consider the testimony of Witnesses Ackerman, Hicks, Palffy and Siemion, and substantial and prejudicial error was committed against all of the defendants by the trial court in admitting in evidence and in considering the statements, and the amended returns of the several defendants, made in the absence of one or the other, all of which were made long after the commission of all acts which the Government claimed constituted guilt of the several crimes charged.

The reversal by the Court of Appeals of the convictions on the conspiracy indictment automatically rules out the mass of evidence admitted into the Record solely because of the claim of conspiracy. Absent such testimony no evidence is left to support the convictions.

Four.

The Court of Appeals erred in not reversing the several judgments of conviction because of the prejudice to the fundamental rights of each defendant which flowed from the erroneous consolidation of all four indictments for trial.

The illegal consolidation of the four indictments for trial was a prejudicial abuse of judicial discretion.

The trial court failed to differentiate as to the proof relative to the several crimes charged. (R. 399.) He was powerless to prevent the abuse of getting evidence into the Record which would have been inadmissible, except for such consolidation. (R. 401.)

The defendants were denied a just and fair trial.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Question One.

The Government admitted the truthfulness of the individual tax returns filed by each defendant separately in March 1944, covering the year 1943, except it disputed the omission from such returns of the item descriptively charged in the separate indictments as "Dividends"; and the Government further admitted that as to the item specifically charged as "Dividends" it had no evidence, and would offer no evidence, to show that any of the defendants had received any "Dividends" from any corporation. (R. 53-56, 87, 88, 258.)

A.

It was therefore a denial of due process to try, and to convict, the defendants of having had gross receipts from dealings in buying and selling whiskey, upon indictments which specifically charged that they had received "Dividends" which were wrongfully omitted from their returns.

In affirming the convictions, the Court of Appeals has decided a federal question in a way in conflict with the applicable decisions of this Court in *Cole* v. *Arkansas*, 333 U. S. 196; *DeJonge* v. *State of Oregon*, 299 U. S. 353; *United States* v. *Cruikshank*, 92 U. S. 542; *United States* v. *Carll*, 105 U. S. 611; *United States* v. *Hess*, 124 U. S. 483; *United States* v. *Britton*, 107 U. S. 655; *Spies* v. *United States*, 317 U. S. 492, 499.

Such decision of the Court of Appeals is in conflict with the decisions of other Courts of Appeals on the same matter in *Singer* v. *United States*, Third Circuit, 58 F. 2d 74, 75; *Kutler* v. *United States*, Third Circuit, 79 F. 2d 440, 442; *Haitman* v. *United States*, Ninth Circuit, 5 F. 2d 887; it is

in conflict with its own decision in *United States* v. *Tuffanelli*, 131 F. 2d 890, 892. (7 C. A.)

The trial court should have discharged the defendants when the District Attorney announced in open court that he had no evidence to convict the defendants of having received corporate dividends as charged in the indictments. The failure of the Court of Appeals to order the discharge of the defendants is a decision of a federal question in conflict with the applicable decision of this Court in *Oscanyan* v. *W. R. Arms Co.*, 103 U. S. 261, and Rules 23(c) and 29(a) of the Federal Rules of Criminal Procedure; Section 115(a) Internal Revenue Code.

By such decision, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

B.

The defendants were deceived and misled by the bills of particulars and the holding of the Court throughout the trial that the issue was one of law as to the meaning of the word "Dividends" as defined by Congress in Section 115(a) Internal Revenue Code, which he would not decide until after the evidence was in. (R. 88.) They gave up their right to a trial by jury when the District Attorney alleged in his bills of particulars that there was no evidence to show that any of the defendants had omitted dividends from his return; the decision of the Trial Court at R. 259, that the "dividend" charge in each indictment "became a very material question upon the substantive counts" prejudicially deceived them as to whether any evidence should be introduced. Under the unusual circumstances in these cases, the specific charge in the indictments, the bills of particulars, the statements of the United States Attorney,

and the rulings of the Court during the trial, the conviction of the defendants upon the joint venture theory was a violation of the rights guaranteed them by the Fifth and Sixth Amendments to the United States Constitution.

In deciding otherwise, the Court of Appeals has misconstrued and misapplied Rule 7(c) and Rule 52(a) of the Federal Rules of Criminal Procedure, and such decision presents an important question in the administration of the criminal law. None but a Grand Jury can bring in an indictment—and it does not lie within the power of a court or District Attorney to change it. The lower courts have sought to escape this rule of fundamental law by treating the variance from the indictment as a mere matter of labelling. In fact the variance is one of substance under the Internal Revenue Code. If a dividend is received the taxpayer is allowed no offsetting deductions, but if money is received in a commercial transaction, the statute allows deductions of costs and expenses before taxable income can be said to arise, Sections 21, 22, 23, 51(a) Internal Revenue Code.

Such decision of the Court of Appeals is a decision upon a federal question in conflict with the decision of this Court in *Kotteakos* v. *United States,* 328 U. S. 750; *Fiswick* v. *United States,* 329 U. S. 211; *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179, and *United States* v. *Murdock,* 290 U. S. 389.

C.

It was prejudicial error to consider the indictments in the sense that they had been altered or amended by the deletion or omission therefrom of the specific words and figures "Dividends, $145,022.72", as to Rosenblum, and the similar words and figures as to Weiss and Stryk, and the convictions will not protect each defendant against another prosecution for the same offense.

In deciding otherwise, the Court of Appeals has decided a federal question in a way probably in conflict with the

applicable decisions of this Court in *Ex Parte Bain,* 121 U. S. 1; *United States* v. *Norris,* 281 U. S. 619; *Morgan* v. *Devine,* 237 U. S. 632.

Such decision of the Court of Appeals is in conflict with the decisions of other Courts of Appeals on the same matter in *Edgerton* v. *United States,* Ninth Circuit, 143 F. 2d 697; *Dodge* v. *United States,* Second Circuit, 258 Fed. 300, 305 (certiorari denied, 250 U. S. 660); *Stewart* v. *United States,* Ninth Circuit, 12 F. 2d 524; see also its own decision in *United States* v. *Denny,* 165 F. 2d 668, 671, with a separate opinion by each, Circuit Judge Kerner, District Judge Lindley and Circuit Judge Minton.

Reasons as to Question Two.

A.

No reason nor explanation is in the Record why defendants' cost and all of the expenses were not properly deductible from the gross receipts. The Court of Appeals erred in deciding that defendants should stand convicted of attempting to evade the payment of income taxes on moneys derived from dealings or transactions involving the purchase and sale of intoxicating liquors, when there was no evidence to show that defendants realized a gain from those transactions. Defendants should have been allowed the cost of the liquor, and the expenses of selling the same; no cost was allowed and only a small part of the expenses of sale were deducted from the gross receipts by the Government.

The decision of the Court of Appeals in not allowing such cost, and the full amount of expenses, is a decision of a federal question in a way in conflict with the applicable decisions of this Court in *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179; *United States* v. *Murdock,* 290 U. S. 389; *Stratton's Independence* v. *Howbert,* 231 U. S. 399; *Eisner* v. *Macomber,* 252 U. S. 189; *Spies* v. *United States,* 317 U. S. 492.

Such decision of the Court of Appeals is in conflict with decisions of Courts of Appeals of other Circuits in *Gleckman* v. *United States,* 80 F. 2d 394, Eighth Circuit, certiorari denied, 297 U. S. 709; *United States* v. *Schenck,* 126 F. 2d 702, Second Circuit; *Nicola* v. *United States,* 72 F. 2d 780, Third Circuit; *Kirsch* v. *United States,* 174 F. 2d 595, Eighth Circuit.

Said decision of the Court of Appeals for the Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision.

B.

The only competent proof in the Record was that defendants received gross income in their whiskey dealings in 1943 which they did not report in their returns. If this was wrong and the same amounted to a crime, it was a misdemeanor and a violation of Section 145(a) of the Internal Revenue Code, Title 26, United States Code, and was not the felony of which defendants each stand convicted under Section 145(b) of said Internal Revenue Code.

It was error of the Court of Appeals to fail to order the discharge of each of the defendants and its decision is a decision of a federal question in conflict with the decision of this Court in *Spies* v. *United States,* 317 U. S. 492.

Reasons as to Question Three.

A.

The Court of Appeals erred in deciding that statements and amended returns of the several defendants, being statements made in the absence of the others, could be received and considered in evidence as admissions against all of the defendants.

The admissions, declarations and acts of those severally charged with the commission of a crime, but jointly tried, made before or after such crime has been committed in the absence of the others, cannot be used against anyone but the declarant and cannot be used against him, unless there is other substantial extrinsic evidence which proves corpus delecti, and there is no such extrinsic, independent proof in this Record.

B.

The admission of the evidence of Ackerman, Hicks, Palffy and Siemion against defendant Weiss was exceptionally prejudicial, as it related solely to transactions concerning sales of the "Beam" whiskey by Rosenblum, at least three months before Weiss had any connection with any of the whiskey transactions; the doctrine of relation back to establish a crime, or to connect one with a crime, is unknown to our criminal law, and such evidence and his conviction thereon was very prejudicial as to Weiss.

Such decision of the Court of Appeals is a decision by it upon a federal question in a way in conflict with applicable decisions of this Court in *Krulevitch* v. *United States,* 336 U. S. 440, 445-446; *Fiswick* v. *United States,* 329 U. S. 211, 215, 217; *Kotteakos* v. *United States,* 328 U. S. 750; *Brown* v. *United States,* 150 U. S. 93, 98; *Logan* v. *United States,* 144 U. S. 263, 309.

The decision of the Court of Appeals upon these questions is in conflict with former decisions of the Seventh Circuit in *Fox* v. *United States,* 45 F. 2d 364; *Roma* v. *United States,* 53 F. 2d 1007; and *Collenger* v. *United States,* 50 F. 2d 345, 348; such decision is in conflict with the decisions of other Courts of Appeals on the same matter in *Lane* v. *United States,* 34 F. 2d 413 (8 C. A.); *Gulotta* v. *United States,* 113 F. 2d 683 (8 C. A.); *Forte* v. *United States,* 94 F. 2d 236 (C. A. D. C.); *Daeche* v. *United States,*

250 Fed. 566 (2 C. A.); *Jordan* v. *United States*, 60 F. 2d 4 (4 C. A.); *Martin* v. *United States*, 264 Fed. 950 (8 C. A.); *Tingle* v. *United States*, 38 F. 2d 573 (8 C. A.); *Naftzger* v. *United States*, 200 Fed. 494 (8 C. A.); *Goff* v. *United States*, 257 Fed. 294 (8 C. A.); *Duncan* v. *United States*, 68 F. 2d 136 (9 C. A.); *Gordnier* v. *United States*, 261 Fed. 910 (9 C. A.); *McWhorter* v. *United States*, 281 Fed. 119, 121 (6 C. A.); *Beck* v. *United States*, 33 F. 2d 107, 112 (8 C. A.).

The decision of the Court of Appeals on these questions has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such departure by a lower court, as to call for an exercise of this Court's power of supervision.

Reasons as to Question Four.

A.

The consolidation of the four indictments for trial was illegal and a prejudicial abuse of judicial discretion because there is no allegation in either of the substantive indictments that the defendants had participated in the same act or transaction or in the same series of acts or transactions constituting the offenses charged. Rules 8 and 13, Federal Rules of Criminal Procedure, make the allegations in the indictments the test by which consolidation shall be determined.

B.

Such consolidation became extremely prejudicial to the defendants because of the abandonment by the Government of the "dividend" theory charged in the indictment, and its adoption of the "joint venture" theory set out in the bills of particular; the issue became confused; the proof relative to the separate charges of each defendant became hopelessly intermingled and the trial court was unable to

differentiate between the proof relative to the several charges, and he did not prevent the abuse which flowed from getting evidence into the Record which would have been inadmissible except for such unlawful consolidation (R. 399, 401) and was confused into relying upon such evidence as proof of the guilt of all of the defendants as to all of the alleged offenses.

The Court of Appeals should have reversed the convictions, and its decision, as to paragraph A, is a decision of a Federal question in a way in conflict with the applicable decision of this Court in *McElroy* v. *United States,* 164 U. S. 76.

Its decision is in conflict with decisions of other Courts of Appeals on the same matter in *Castellini* v. *United States,* 64 F. 2d 636, Sixth Circuit, and *DeLuca* v. *United States,* 299 Fed. 741, 744, Second Circuit.

As to paragraph B, the decision of the Court of Appeals is a decision of a federal question in a way in conflict with *Kotteakos* v. *United States,* 328 U. S. 750; *Fiswick* v. *United States,* 329 U. S. 211 and *Krulevitch* v. *United States,* 336 U. S. 440, 445, 446.

It is in conflict with the decision of the Court of Appeals for the District of Columbia in *McMullen* v. *United States,* 96 F. 2d 574.

The decision of the Seventh Circuit is in violation of Rule 8(b) of the Federal Rules of Criminal Procedure, and such decision presents an important question in the administration of the federal criminal law.

WHEREFORE, your petitioners separately and severally pray that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the Record and all proceedings of said Court of Appeals had in these

causes, to the end that these causes may be separately and severally reviewed and determined by this Court; that the several Judgments of the Court of Appeals against each defendant be reversed; and that each petitioner may be granted such other and further relief as may seem proper.

Dated: Indianapolis, Indiana, October 6, 1949.

LOUIS H. ROSENBLUM,
MAX STRYK,
JACOB WEISS,
Petitioners.

By: ALBERT WARD,
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Attorneys for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

Nos. .....

LOUIS H. ROSENBLUM,
Petitioner, Appellant below,

vs.

UNITED STATES OF AMERICA,
Respondent, Appellee below.

MAX STRYK,
Petitioner, Appellant below,

vs.

UNITED STATES OF AMERICA,
Respondent, Appellee below.

JACOB WEISS,
Petitioner, Appellant below,

vs.

UNITED STATES OF AMERICA,
Respondent, Appellee below.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The Opinion of the United States Court of Appeals for the Seventh Circuit has not been officially reported, but a copy thereof is in the printed record, Opinion by Circuit

Judge Kerner being on pages 386 to 398; Chief Judge Major, pages 398 to 400, and Circuit Judge Duffy, pages 400 to 402; for convenience, a copy of the Opinion of each Judge is set out in full in the Appendix hereto as Exhibit "A".

The Opinion of the District Judge has not been officially reported, but a copy thereof is in the printed Record on pages 275 to 282.

Jurisdiction.

The Judgment against each defendant by the Court of Appeals now sought to be reviewed was entered on June 13, 1949. (R. 403, 404, 405.) Each defendant filed a petition for rehearing in the Court of Appeals on June 23, 1949 (R. 405), which were all denied on August 24, 1949. (R. 406.) Issuance of the Mandate of the Court of Appeals was stayed by it on August 26, and September 23, 1949.

On September 20, 1949, Mr. Chief Justice Fred M. Vinson, for cause shown, upon the application of counsel for defendants, ordered that the time for filing Petition for Certiorari in these causes be extended to and including October 7, 1949.

The Jurisdiction of the Supreme Court is invoked under Section 1254(1), Title 28, United States Code, Judiciary and Judicial Procedure, effective September 1, 1948.

The foregoing Petition is presented by the separate and several petitioners who were the defendants in and parties to said Criminal Causes as in said Petition set out.

Statutes Involved.

The following sections of the Internal Revenue Code, Title 26, United States Code, as the same were in effect at the applicable period, are involved in these proceedings: Section 21(a), Section 22(a), Section 22(e), Section 22(f), Section 22(n), Section 23(a), Section 23(b), Section 23(e), Section 23(i), Section 41, Section 48(a), Section 51(a), Section 53(a), Section 115(a), Section 117, Section 145(a), Section 145(b).

Federal Rules of Criminal Procedure for District Courts Involved.

The Federal Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946, which are involved in defendants' Petition are as follows: Rule 7(c), Rule 8(a), Rule 8(b), Rule 13, Rule 23(c), Rule 29(a), Rule 52(a), Rule 52(b).

Statement of the Case.

A statement of the case is included in the preceding Petition under Title I thereof, "Summary Statement of the Matter Involved."

Specification of Errors Intended to be Urged.

It is intended to urge as errors each specification in the foregoing Petition under Titles III and IV thereof, entitled "Questions Presented" and in the "Reasons Relied on for the Allowance of the Writ."

SUMMARY OF ARGUMENT.

One.

Each indictment charged that each defendant had omitted "Dividends" from his 1943 income tax return; no other item was in dispute; the Government admitted that it had no evidence to prove that any defendant had received any corporate dividends which he had failed to report; the defendants requested the Court to find that the Government had no evidence to prove the charge as laid in the indictments, which the Court refused to do, but permitted the District Attorney to introduce evidence concerning whiskey transactions in which the Government claimed the defendants had engaged as participants in a joint venture.

Such charge was not made in either indictment, and each defendant was denied due process in that he was wrongfully tried upon and convicted of an offense not charged against him.

Two.

The Government failed to show that any of the defendants had any net income for 1943 upon which he did not pay his tax, and there was a failure of proof of *corpus delecti;* the defendants sustained a loss in the 1943 whiskey transactions; the trial court erroneously placed the burden upon the defendants of proving their innocence.

In contravention of the Sixteenth Amendment the Court allowed neither cost nor expenses of the whiskey bought and sold.

Three.

The receipt in evidence of the hearsay statements of the several defendants, and their amended tax returns, all made long after the commission of all acts claimed by the

Government to constitute the offenses charged, was prejudicial to the individual rights of each defendant in the substantive charges. The reversal by the Court of Appeals on the conspiracy indictments automatically rules out this mass of incompetent evidence which was admitted into the record solely because of the claim of conspiracy in the consolidated trial, and such evidence was not admissible on any theory as to either the substantive or the conspiracy charges.

The admission of the evidence of witnesses Ackerman, Hicks, Palffy and Siemion was clearly hearsay as to Weiss, and very prejudicial as to him.

The admission of Government's Exhibit X-1, transcript of statement of Mr. Rosenblum of March 21, 1944, was prejudicial as to Weiss and Stryk, and it was hearsay as to them.

Four.

The cases below were illegally consolidated for trial in violation of Rules 8 and 13 of the Federal Rules of Criminal Procedure.

Two judges of the Court of Appeals decided that the substantial rights of the defendants were prejudiced by the procedure in the trial court and reversed the convictions on the conspiracy indictment because the trial court could not differentiate between the proof relative to the various charges against the several defendants (R. 399); he could not prevent the prejudice resulting to the substantial rights of the several defendants which flowed from the erroneous consolidation of the causes, and the admission of incompetent testimony (R. 401); such prejudicial error cannot be confined to the conspiracy charge; it likewise prejudicially affected the substantial rights of the several defendants as to the substantive charges, and these causes should be reviewed.

ARGUMENT.

Question One.

The defendants respectfully contend that it was a denial of due process to convict them of having received gross amounts in cash from buying and selling whiskey that were not accounted for in their tax returns, upon the separate indictments which definitely charged that they had received "Dividends" in a specific amount which were omitted from their individual tax returns. Such procedure of the Government was an abandonment of the charge laid in the indictment, and an entire failure of proof, and if the matter is treated or regarded merely as a variance, it was of such a substantive character as to mislead the defendants in the preparation and presentation of their defense, and such conviction would not protect them against another prosecution for the same offense.

The trial court and the Court of Appeals have misconstrued and misapplied Rule 7(c) of the Federal Rules of Criminal Procedure, which requires that the indictment shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

Under this Rule, an indictment cannot be used as a trap to ensnare a defendant, and then, after his trial is over, convict him on a charge or theory not properly or plainly outlined in such indictment.

Section 115(a) of the Internal Revenue Code, Title 26 United States Code, defines the word "Dividends" as a distribution by a corporation out of earnings or profits; the term "capital gain" is also defined by Section 117 of the Internal Revenue Code; both of these terms were used

by the Grand Jury in the indictments charging Rosenblum and Stryk with a violation of Section 145(b), and the word "Dividend" was used in the indictment against Weiss.

The charge was that the defendants had received "Dividends" which they failed to report; this could not mean anything except corporate dividends as defined by Section 115(a) of the Internal Revenue Code; this is a proper charge, as dividends are taxable to the person who receives them; but if, as the trial court said, they organized corporations and diverted from the corporation part of the moneys received for the liquors, such money belonged to the corporation and was not defendants' money. Embezzled moneys are not income to the embezzler. *Commissioner* v. *Wilcox,* 327 U. S. 404.

If the moneys belonged to corporations, before these could be said to be dividends from such corporations, it was incumbent upon the Government to prove that such corporations had sufficient "earnings or profits" remaining after the proper deductions, and the provision for all taxes to be paid by the corporation. Section 115(a) Internal Revenue Code. No such proof was made.

The Government admitted that the returns as filed by the defendants correctly listed all items of income except the item alleged in the indictments as "Dividends", and admitted it had no evidence to prove that any of the defendants had received corporate dividends which he failed to report.

Furthermore, the Government stipulated with the defendants that the moneys which it claimed they had omitted from their several income tax returns for 1943, "were the gross amounts received in cash by Louis H. Rosenblum in the transactions from purchasers" of liquor (Government's Exhibit Z); by such admission it is estopped from now asserting that the evidence supported the theory of

the prosecution as laid in the indictments; such admission is an abandonment of the issue tendered by the indictments.

Throughout the trial defendants objected to proof offered by the District Attorney to show receipt of moneys from a joint venture.

When the Government rested, defendants filed their motions for judgments of acquittal on each of the substantive indictments (R. 252) and when they pressed their motions that the Government had failed to prove the charges laid in the substantive indictments, that there was a total failure of proof of the charges made, and there was no evidence to sustain the charge of omitting "Dividends", the court said:

> "Now, that becomes a very material question upon the substantive counts." (R. 259.)
>
> * * * * *
>
> "I prefer not to pass upon this motion as to the substantive counts at this stage of the proceedings. * * *" (R. 262.)

The court did not decide the question thus presented by the defendants until *after* the trial. (R. 283.)

The failure of Congress to define the manner by which the evasion might be accomplished, placed the duty and the burden on the Government of having an indictment returned which definitely contained all of the elements necessary to constitute the offense intended to be punished; *Spies* v. *United States,* 317 U. S. 492, 499; *United States* v. *Carll,* 105 U. S. 611; *United States* v. *Cruikshank,* 92 U. S. 542; *United States* v. *Hess,* 124 U. S. 483; such essential averments must be proved before a conviction can be had.

No authority exists for a change of the charge as laid against defendants in the indictments, except it be done by

the Grand Jury; courts are powerless, under our system of justice, to allow or permit a defendant to stand convicted upon a charge not laid in the indictment, but contained in averments of a bill of particulars. *Ex Parte Bain,* 121 U. S. 1; *Edgerton* v. *United States,* 143 F. 2d 697 (9 C. A.); *Cole* v. *State of Arkansas,* 333 U. S. 196; *United States* v. *Cruikshank,* 92 U. S. 542.

The decision in *Ex Parte Bain,* 121 U. S. 1, 13, forbids the conviction of the defendants upon a charge not laid in the indictment, and forbids any change where the change is one of substance, and such change cannot be made even with the consent of the defendants, *United States* v. *Norris,* 281 U. S. 619. Nor is it necessary that the indictment itself be changed by physically striking therefrom the word "Dividends"; it is prejudicial error to consider the indictments *in the sense* that they have been altered by the omission of the term "Dividends" therefrom: *Edgerton* v. *United States,* 143 F. 2d 697 (9 C. A.); *Dodge* v. *United States,* 258 F. 300, 305 (2 C. A.).

The Court of Appeals erred in deciding that each defendant would be protected against another prosecution for the same offense; the test of identity of offenses is whether the same evidence is required to sustain them; evidence to sustain the conviction in these income tax cases on the theory that defendants had omitted dividends from their tax returns would not sustain the changed theory of the Government that they had received either gross or net income from a joint venture which they did not report. *Morgan* v. *Devine,* 237 U. S. 632.

The Court of Appeals was in error in deciding that "It is sufficient to charge a defendant with acts coming within the statutory description in the substantial words of the statute"; *this does not decide the question we present; we admit the indictments are sufficient;* defendants claim they

were deceived by the use of the statutory words in the indictments, the statements of the trial court that such words were material, the admission by the Government that it had no evidence to prove the crime charged, and the later conviction upon an issue not presented by the indictments; these questions were not decided by the Court of Appeals; the cases of *Capone* v. *United States,* 56 F. 2d 927; *Rose* v. *United States,* 128 F. 2d 622; or *Cave* v. *United States,* 159 F. 2d 464, cited by the Court of Appeals in support of decision (R. 388), are not decisive of the questions raised by the defendants herein; neither of such cases contains the element of *abandonment* of the charge made in the indictment, nor the element of *change of theories* by the Government and the trial court, nor the element of *deception* resulting therefrom which caused defendants to waive their right to a jury trial, and deceived them as to the introduction of evidence.

These are elements of the offense as charged which affected the substantial rights of the defendants; they go directly to questions which are highly important in the administration of the federal criminal laws; they involve a construction by this Court of its Rules 7(c) and 52(a), Federal Rules of Criminal Procedure and the procedure below prejudicially affected the substantive rights of the defendants and it cannot be justified under Rule 52(a) as being harmless and immaterial; *Kotteakos* v. *United States,* 328 U. S. 750; *Fiswick* v. *United States,* 329 U. S. 211-218.

Question Two.

Notwithstanding the definite charge in the indictments, the Government undertook the prosecution of the defendants upon the theory that they were jointly engaged in selling and dealing in whiskey in 1943, from which it claims they received gross partnership receipts not accounted for in their several income tax returns.

Such theory created a presumption, and the court will take judicial notice, that the defendants had costs in connection with acquiring such whiskey, and expenses in selling it. (Sections 21, 22, 23 and 51a, Internal Revenue Code, Title 26, United States Code.) Such presumption, and the facts created by such judicial notice, placed upon the Government the additional burden of establishing beyond a reasonable doubt that the gross receipts from such sales and dealings in property exceeded the cost and reasonable and necessary expenses in acquiring and selling the same. The Government failed to make such proof. The trial court wrongfully decided that *this burden* was upon the defendants (R. 279), and held that *they* should have rebutted the Government's case by introducing evidence of the expenses which they asserted were incurred in the sale of the whiskey, as such evidence would have been admissible under the joint venture, *but not under the dividend theory.* The trial court placed upon the defendants the burden of proving their innocence, and admitted that the cases had been tried by him upon inconsistent theories requiring different evidence to sustain convictions. (R. 279.)

The Court allowed the defendants no costs for the whiskey.

The Court of Appeals erred, to the serious prejudice of each defendant, upon the vital fact of defendants' whiskey cost. It stated in error that an inference could have been assumed by the trial court that such cost might have been claimed by another taxpayer in its tax returns. Such an inference is nowhere assumed by the trial court (R. 275-282) and would have been a violent assumption of a fact without any Record foundation or basis.

The Court of Appeals, without Record foundation or basis, and without any of the objections stated in its footnote on R. 397 having been made or suggested at the trial

(R. 121, 122), erred to the serious prejudice of each defendant by summarily dismissing consideration of defendants' expenses as shown in Government's Exhibits A-13 and A-14; it was manifest error for the Court of Appeals to state that the expenses shown by such Exhibits were items of expenses which defendants' accountant stated he was instructed not to include in the Gary Corporation costs when he was making up its return. (R. 397, 102, 103, 104, 121, 122, and Government's Exhibits A-4, A-5, D-1, D-77, D-78.)

Defendants were prejudiced by the court's acceptance, over defendants' objections, of hypothetical questions and answers by the Government's tax expert, which were incomplete, failed to take into consideration any cost and, without any explanation, only a few expenses. The defendants thereby suffered substantial prejudice, for the questions and answers assumed as true, facts definitely disproved by the Government's own evidence. *Kirsch* v. *United States,* 174 F. 2d 595 (8 C. A.)

The Sixteenth Amendment to the Constitution does not permit, and Congress never intended, that gross receipts from the sale of property should be subject to an income tax. *Stratton's Independence* v. *Howbert,* 231 U. S. 399; *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179. In Title 26, United States Code, Sections 22 and 23, Congress set up the statutory formula to compute income taxes, which is that the cost of the goods sold shall be deducted from the gross receipts received from the sale and, in computing net income, the statutory deductions such as ordinary and necessary expenses, interest, taxes, salaries, etc., shall be allowed. The net taxable income must be computed according to the statutory provisions, and this has not been done in these cases. The Government has ignored the formula, refused to allow the cost of the merchandise and the statutory deductions and credits, and there is no evidence that

defendants had any gain in 1943 in their liquor transactions; they had a loss.

Question Three.

The error in receiving in evidence and considering statements and the joint venture and amended returns of the several defendants, each of which was made long after the commission of all acts which the Government claimed constituted the offenses charged, was extremely prejudicial to the individual rights of each defendant.

The prejudice is pointed up by Government's Exhibit X-1, transcript of statement of Mr. Rosenblum of March 21, 1944, not made in the presence of either Weiss or Stryk; this statement was used against all of the defendants by Judge Kerner (R. 395), together with the evidence of Ackerman, Hicks, Palffy and Siemion as to "Beam" whiskey transactions which were had with Rosenblum, with Weiss not present, and concerning transactions which it is admitted Weiss had neither knowledge nor participation (R. 393), and to which testimony Weiss made timely objections because such evidence was hearsay as to him.

It was a violation of the fundamental rights of Weiss and Stryk to have Rosenblum's statement of March 21, 1944, considered against either of them for any purpose; the testimony of Ackerman adopted by Judge Kerner as showing Rosenblum's receipt of side payments of $78,230.00 and $35,000.00, from Ackerman, is very prejudicial to Weiss; the Ackerman transactions were not included in the Stipulation (Government's Exhibit Z) at the trial. At R. 393, Judge Kerner said:

> "Nor was there anything in the stipulation or testimony of the purchaser connecting Weiss with any of the transactions involved in the sale of the Beam whiskey."

Judge Kerner (R. 395, 396) recites further from the hearsay statements of each defendant (Government's Exhibits X-1, U-1, U-2, U-3, V-1, V-2, V-3, V-4 and V-5) and relies upon these to affirm the convictions. The trial court relied on all of these statements for the conviction of all of the defendants on all of the charges. (R. 244, 280, 281, 392.)

Both courts also erroneously considered the partnership or joint venture and the amended individual returns (R. 277, 281, 392, 396); these were hearsay and especially prejudicial because they were clearly and admittedly inaccurate and untrue, were not intended to reflect correctly the defendants' tax liability (R. 101, 105, 115, 116, 119, 120), and were wholly foreign to the charge made in the indictments that the defendants had received "Dividends" which were allegedly omitted from their tax returns. (R. 88, 89.)

The defendants repeatedly objected to the introduction of such evidence, and in response to such objections, the trial judge always assured defendants' counsel that such hearsay evidence was being admitted and would be considered only as applying to each individual defendant concerned, and "against him solely and without prejudice to the others until and unless by PROPER evidence, a conspiracy is shown." (R. 95.)

But the trial court failed to differentiate between the proof relevant to the substantive offenses and that relevant to the conspiracy charged; it was impossible for him to prevent the abuse to the defendants' rights which followed the introduction of said incompetent evidence. (R. 399, 401-402.)

Said several statements cannot be used against any of the declarants for any purpose until, and when, by inde-

pendent extrinsic evidence, *"corpus delicti"* as to him, has been established.

Krulevitch v. *United States,* 336 U. S. 440.
Fiswick v. *United States,* 329 U. S. 211.
Kotteakos v. *United States,* 328 U. S. 750.
Roma v. *United States,* 53 F. (2d) 1007 (7 C. A.).
Gulotta v. *United States,* 113 F. (2d) 683 (8 C. A.).

Question Four.

There is no allegation in either indictment that the defendants were engaged in the same act or transaction, nor in two or more acts or transactions connected together; these allegations must be in the indictments before there can be a consolidation, over objections, of separate individual indictments; Rule 13, Federal Rules of Criminal Procedure. Clearly, the three defendants could not be joined in a single indictment for having separately filed false individual income tax returns, unless it is alleged in the separate indictments that they "have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Rule 8, Federal Rules of Criminal Procedure. There is no such allegation in either indictment. In *DeLuca* v. *United States,* 299 F. 741 (2 C. A.), it is said:

> "The statute makes the test what appears on the face of the bills themselves. It does not depend in any degree upon the order in which the prosecutor intends to bring them to trial."

This principle was approved in *Castellini* v. *United States,* 64 F. 2d 636 (6 C. A.), and is based upon *McElroy* v. *United States,* 164 U. S. 76. Rules 8 and 13 still prohibit consolidation unless the allegations in the indictments show the defendants were engaged in the same acts, or series of acts, or transactions connected together

and such consolidation cannot be built upon the mere assertions of the United States Attorney.

These cases present a typical example of how the fundamental rights of a defendant may be extremely prejudiced by departing from the Rules of this Court relating to consolidation of criminal actions.

The manifest unfairness to the defendants in the proceedings below started with the filing of the bill of particulars by the United States Attorney wherein he abandoned the well defined "Dividend" charge in each indictment. (R. 53, 54, 55.)

Then, he obtained the consolidation order, over the objections of the defendants. (R. 63.)

He realized that there were no allegations in the indictments which would authorize a consolidation of separate indictments against three individuals for filing a false individual income tax return, and he endeavored to supply such essential allegations by his written motion. (R. 62.)

Early in the trial, when the Government admitted that it had no evidence to prove that either defendant had received any corporate dividends which he omitted from his return (R. 88), the court declined to make a finding as required by Rules 23(c) and 29(a) Federal Rules of Criminal Procedure requested by the defendants that the Government had no evidence to prove the dividend theory as charged in the indictment; he said he would not pass at that stage of the case upon what constitutes dividends under the Act of Congress, but he would reserve that until the conclusion of the evidence; he said he could see that there was going to be controversy all through the lawsuit about whether anything in the indictment can be reached under the designation of dividends. (R. 89.)

Thereafter, and through the trial, the defendants were

caught between the contention of the District Attorney that he had no evidence to show that either defendant had received any corporate dividends which he failed to report, and the position of the court that the allegation in the indictments as to dividends "becomes a very material question upon the substantive counts." (R. 259.)

The resulting prejudice to the defendants was highly increased because of the wrongful consolidation, as the court admitted the hearsay evidence including all of the foregoing statements and returns on the conspiracy charge, and then he failed to differentiate between the proof relevant to the substantive offenses and that relevant to the conspiracy charge (R. 399); he was powerless to prevent the abuse which followed the hearing and consideration of such inadmissible evidence in the causes as improperly consolidated. (R. 401.)

When the defendants on their motions for acquittal, urged that they were not prepared to try the substantive counts upon the proposition that the Government was entitled to show anything upon those counts except "Dividends" in the statutory sense as defined by Congress, and they ought then be acquitted (R. 257), the District Attorney urged upon the court his position that:

> With one exception, the defendants were not record stockholders of any of these corporations: that the Grand Jury could not have been charging them with getting dividends because people who are not stockholders can't get dividends of corporations, and the Grand Jury knows that.
>
> "The Court: Yes, but they said dividends."

The United States Attorney:

> "They said dividends, but dividends, Your Honor, in the dictionary means a division of profits. Webster's Dictionary says that it is a division, that which is to be divided. It tells the Latin derivation of it.

A sum of money for division, one of the divisions so made.

Specifically—especially it defines a dividend of corporations, a dividend or profits of a firm or a corporation as a preferred stock paid, a dividend, distribution of shares, or apportionment of a firm. Now, it is my contention that the Grand Jury, knowing that these men were not stockholders, of the corporation, used the word in the common language, and I don't think there is any objection to doing that." (R. 257, 258.)

Mr. Harrell, for the defendants, insisted that,

"Earnings to the corporation and money should have gone into it, but after it became the assets, well, we will properly say of the corporation, then the corporation should have, with its expenses and deductions against its operation, have shown net earnings out of which these moneys should have gone; otherwise, it is not a dividend as defined by statute."

"The Court: *Well that is the question of the case.*" (R. 261.) (Emphasis supplied.)

The court never changed his legal position so announced during and at the close of the trial that the allegation as to the omission of "Dividends" was a very material one (R. 259), and that it "is the question of the case", until he later found the defendants guilty and filed his memorandum opinion (R. 275-282), wherein he decided that evidence of expenses incurred in the sale of the whiskey would have been admissible under the joint venture theory, but not under the dividend theory, and decided that the convictions could rest on Rule 52 of the Federal Rules of Criminal Procedure. (R. 279.)

This was a gross miscarriage of justice, caused by the wrongful consolidation of the causes for trial. As Circuit Judge Duffy points out (R. 400), it was an abuse of judicial process to charge conspiracy when practically the

same offense had been charged in substantive counts; he said the courts have protested vigorously against the current and perhaps growing habit of indicting for conspiracy in addition to the substantive offenses, and that such procedure often constitutes a serious threat to the fair administration of justice, and the Senior Circuit Judges have been pointing out the dangers of such practice since 1925. (R. 401.)

Chief Judge Major concluded that the conspiracy charge had to be reversed because of the failure of the court to differentiate between the proof relative to the substantive offenses and that relevant to the conspiracy charge. (R. 399.)

Circuit Judge Kerner was careful to assert that "We are not to be understood as approving generally of the practice (of consolidation), but it is clear that these indictments could have been included in one indictment of four counts. See Rule 8(a) and (b) Federal Rules of Criminal Procedure". (R. 389.) But this Rule does not authorize consolidation unless there are proper allegations in the indictments; which question, though presented by defendants, was not decided by the Court of Appeals; *Cataneo* v. *United States,* 167 F. 2d 820 and *Rakes* v. *United States,* 169 F. 2d 739, cited by the Court of Appeals (R. 389) do not decide the question defendants present by their petition; there was no claim in either of said cases, as there is here, that there had been an abuse of judicial process in returning a conspiracy indictment, in addition to substantive indictments, and because of a wrongful consolidation thereof, the trial court was powerless to prevent the abuse of getting into the record evidence which would not have been admissible, except for such erroneous consolidation (R. 401), and by reason thereof the trial court was unable to differentiate between the proof relevant to the substantive offense and that

relevant to the conspiracy charge. (R. 399.) It should be observed that in *Rakes* v. *United States,* 169 F. 2d 739, the court said that

> "The several offenses charged in this indictment were not only similar but were based on transactions constituting parts of a common plan, *clear upon the face of the indictment.*" (Emphasis supplied.)

That this question of improper consolidation is an important one in the administration of the federal criminal law is accentuated by the divided opinion of the Seventh Circuit in its case of *United States* v. *Tuffanelli,* 131 F. 2d 890, 893, 894, where Circuit Judge Kerner warned that "it is not good practice to join in an indictment counts charging distinct offenses against separate defendants", and Circuit Judge Major vigorously contended that

> "It is poor consolation to a defendant who is forced to trial, improperly joined with other defendants, for a reviewing court merely to disapprove 'the practice followed' with an expression of doubt that his rights have been prejudiced."

Such question of improper consolidation should be set at rest by the decision of this Court; two judges of the Court of Appeals have held that the substantial rights of the defendants were prejudiced by the failure of the trial court to give them a fair trial on the conspiracy charge; such error cannot possibly be confined to the conspiracy indictment; it affected the rights of all of the defendants in all of the cases. Error being clearly shown in the record, and it further appearing that the error is of such a character that its natural effect is to prejudice defendants' substantial rights, the conviction cannot be sustained.

Conclusion.

This Court should grant the writ as prayed for by each defendant, and upon review reverse the judgments of the lower courts.

Respectfully submitted,

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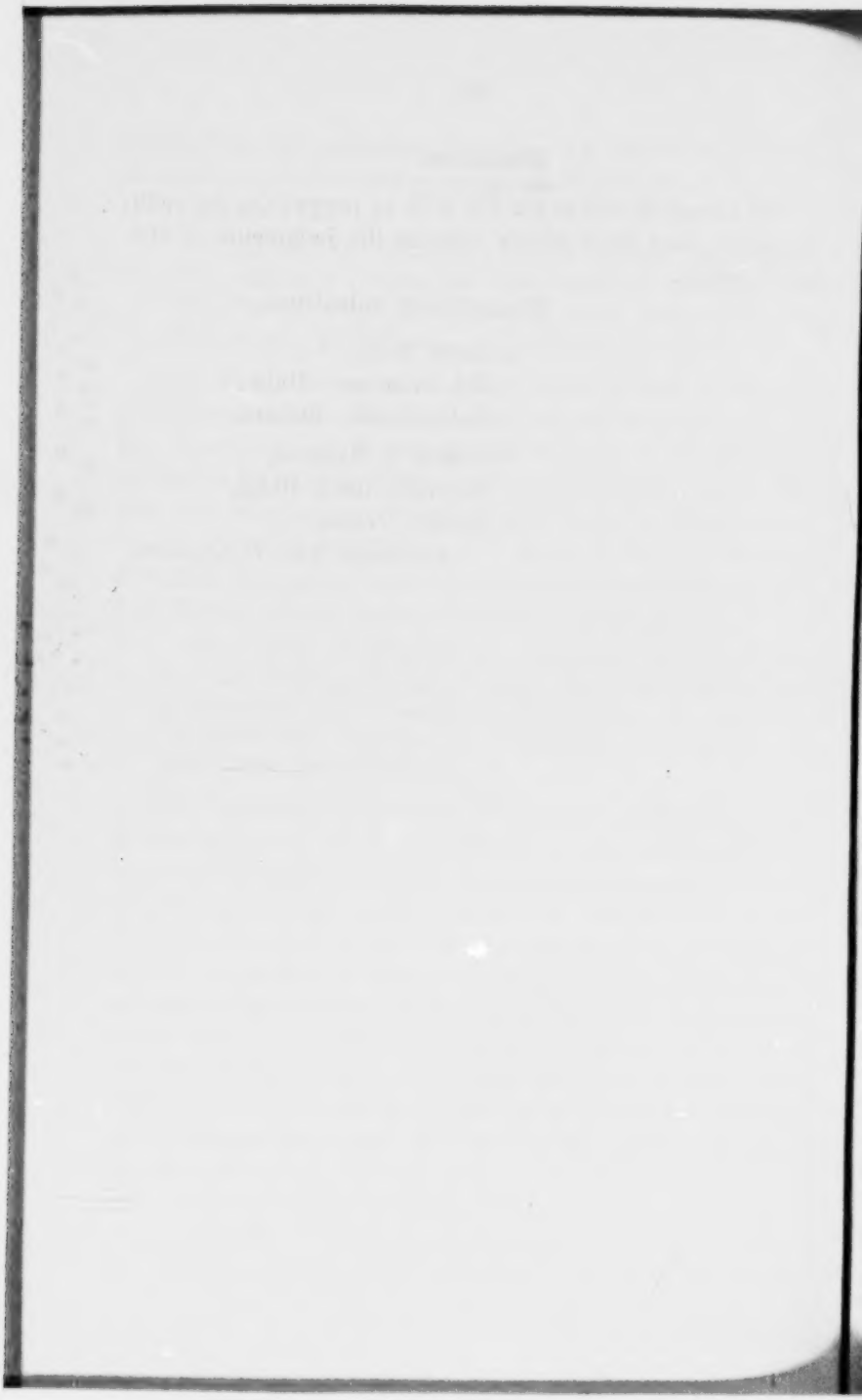

APPENDIX.

EXHIBIT A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

Nos. 9718-9723. October Term, 1948, April Session, 1949.

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *vs.* LOUIS H. ROSENBLUM, *Defendant-Appellant.*	Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.
THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *vs.* MAX STRYK, *Defendant-Appellant.*	
THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *vs.* JACOB WEISS, *Defendant-Appellant.*	

June 13, 1949.

Before MAJOR, *C. J.*, and KERNER and DUFFY, *JJ.*

KERNER, *J.* These are appeals from judgments of conviction and sentence under four separate indictments. Three indictments charged that defendants wilfully and

knowingly attempted to defeat and evade income tax liability for the year 1943; the fourth charged that defendants conspired with each other, each to evade his own as well as his co-defendants' income taxes for the year 1943 in violation of Sec. 37 of the Criminal Code, 18 U. S. C. A. Sec. 88 now Sec. 371. The indictments were consolidated. A jury was waived and the cases were tried by the court.

Defendants present numerous alleged errors, but grouped together, in substance, they present for consideration the following contentions: That the court erred (1) in failing to dismiss the indictments when the United States Attorney announced he had no evidence to prove that each defendant had received corporate dividends which he failed to report, (2) in consolidating the causes for trial, (3) in overruling motion to dismiss the conspiracy indictment; and (4) that there was no evidence of any wilful intent to evade the tax.

First: The three separate indictments for the substantive offense were based on Sec. 145(b) of the Internal Revenue Code, 26 U. S. C. A. Sec. 145(b), which provides that any person who wilfully attempts in any manner to evade or defeat any tax imposed by the chapter or the payment thereof shall be punished as therein specified. They charged each defendant with having wilfully and knowingly attempted to defeat and evade a large part of the income and victory tax due and owing by him to the United States of America for the calendar year 1943, by filing and causing to be filed a false and fraudulent income and victory tax return. In his return Rosenblum stated that his net income was $36,658.89 and the tax due thereon $18,490.95, whereas, as he then and there well knew, his net income was $210,397.21, upon which net income he owed the United States of America $157,760.36; Weiss stated that his net income was $28,051.04 and the tax due thereon

$12,380.74, whereas his net income was $149,018.86 and the tax thereon was $113,032.04; and Stryk stated that his net income was $37,683.62 and the tax due thereon $18,-829.26, whereas his net income was $211,421.95 and the tax thereon was $158,066.80. The returns in the indictments were alleged to be false in that Rosenblum omitted from the statement of his gross income "Dividends, $145,-022.72"; Weiss omitted "Dividends, $120,967.72"; and Stryk omitted "Dividends, $145,022.74."

The record discloses that in response to defendants' request, the Government, some seven months before the actual trial of the cases, filed a bill of particulars in each case. Except for the different amounts and names, they were substantially the same. In the Rosenblum case it was said there would be no effort to prove that the $145,022.72 listed as dividends under the heading gross income represented corporate dividends; that this money represented dividends or a division of money received by the defendant from a joint venture or joint enterprise in which he, Max Stryk and Jacob Weiss were participants; and that said $145,022.72 was received from the sales of intoxicating liquors.

Based upon this state of the record, defendants contend that the court should have dismissed the indictments. They argue that the word "dividends" used in describing the gross income which defendants failed to report, is a material and necessary part of the indictment, is descriptive of the offense, and must be proved as charged. In other words, to permit evidence that defendants received money as their share of over-ceiling prices from the sale of whiskey, which they failed to report in their income tax returns, would create a fatal variance between the indictment and the proofs to be adduced.

We cannot accede to this contention. We state our reasons briefly. A variance is not regarded as material un-

less it is of such a substantive character as to mislead the accused in preparing his defense or place him in second jeopardy for the same offense. *Berger* v. *United States,* 295 U. S. 78, and *United States* v. *Ragen,* 314 U. S. 513. In the state of this record, there can be no question as to each defendant being protected against another prosecution for the same offense, and it is clear that he was not surprised in any way by the character of the evidence to be adduced. Here, the gravamen or the essential ingredient of the charge was the wilful attempt to evade and defeat the tax. The statute says that every attempt to evade or defeat the payment of income tax is a violation of the law. It is sufficient to charge a defendant with acts coming within the statutory description in the substantial words of the statute. *Capone* v. *United States,* 56 F. 2d 927; *Rose* v. *United States,* 128 F. 2d 622; and *Cave* v. *United States,* 159 F. 2d 464. In our case, the character of the offense with which each defendant was charged, was not changed by the use of the word "dividends." The indictment set forth the facts which made up the charge against each. He was still charged with a wilful attempt to evade and defeat the payment of his income tax. *Hall* v. *United States,* 168 U. S. 632; *Mathews* v. *United States,* 15 F. 2d 139; *Jones* v. *United States,* 72 F. 2d 873; *Panella* v. *United States,* 140 F. 2d 71; and *Ferrari* v. *United States,* 169 2d 353. Hence, that part of the indictment which gave the break-down of the gross income and allowable deductions was surplusage or a mere defect or imperfection in form which did not tend to the prejudice of each defendant, and as such, need not be proved.

Second: The ground urged for reversal is that the court erred in consolidating the four indictments for trial. We are not to be understood as approving generally of the practice, but it is clear that these indictments could have been included in one indictment of four counts. See

Rule 8(a) and (b) Federal Rules of Criminal Procedure, 18 U. S. C. A. following Sec. 687. In such a situation, the question of consolidation is vested in the sound discretion of the trial judge and his decision will be reversed only upon a clear abuse of that discretion. *Cataneo* v. *United States,* 167 F. 2d 820, and *Rakes* v. *United States,* 169 F. 2d 739. No error was committed in consolidating the cases. We think the court exercised a wise and sound discretion.

Third: Defendants contend that the conspiracy indictment should have been dismissed because (a) it did not state facts sufficient to constitute an offense against the United States; (b) it failed to allege whether the conspiracy was to commit an offense against the laws of the United States or to defraud the United States; and (c) it was vague and indefinite, and failed to set out the manner in which the alleged conspiracy would be accomplished.

A conspiracy is a partnership in crime. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 253. A combination of two or more persons by concerted action to accomplish a purpose either criminal or otherwise unlawful comes within the accepted definition of conspiracy. *United States* v. *Hutto,* 256 U. S. 524, 528. And the fact that income fraudulently concealed is derived from an illegal joint enterprise in no way militates against the further charge of conspiracy. It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. *American Tobacco Co.* v. *United States,* 328 U. S. 781, 809.

A conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. And the parties may be punished for their agreement to commit a crime as well as for the completed crime—even though the substantive offense is charged as an overt act in the conspiracy indictment.

"* * * For two or more to confederate and combine

together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered." *United States* v. *Rabinowich,* 238 U. S. 78, 88.

In *Pinkerton* v. *United States,* 328 U. S. 640, the defendants were indicted for violation of the Internal Revenue Code. The indictment contained ten substantive counts and one conspiracy count. Each of the substantive offenses found was committed pursuant to the conspiracy. The Pinkertons contended that the substantive counts became merged in the conspiracy count and that only a single sentence could be imposed. The Supreme Court, however, refused to accept the proposition that the substantive offenses were merged in the conspiracy. The contrary applies also. In that case, at page 643, the Court said: "It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established."

In our case the indictment charged that the defendants "On or about the first day of January, 1942, and continuously thereafter until the return of this indictment * * * unlawfully, knowingly, wilfully, and feloniously conspired * * * together, with each other, and with other persons to the Grand Jurors unknown, to attempt to evade and defeat large parts of the income and victory taxes due and owing and to be due and owing by them, said defendants and each of them, to the United States of America

for the calendar year 1943 by filing and causing to be filed with the Collector of Internal Revenue * * * false and fraudulent income and victory tax returns wherein each of said defendants would state that his taxable net income for income and victory tax purposes for said calendar year was far less than it actually was, and that the income and victory tax due from him for said calendar year was far less than the amounts actually due the United States of America on that account." The indictment also enumerated 23 overt acts averred to have been committed in furtherance of and for the purpose of carrying into effect the purpose of the conspiracy.

We conclude that the indictment stated facts sufficient to constitute an offense against the United States. It was not vague or indefinite. It clearly set forth all the necessary facts to constitute an offense against the United States. See *Capone* v. *United States, supra,* and *Jelke* v. *United States,* 255 Fed. 264.

The point is also made that the defendants may not be convicted upon statements made by them after the alleged conspiracy has ended, and *Fiswick* v. *United States,* 329 U. S. 211, is cited. The argument is that the evidence failed to show any unit of design and purpose or that there had been a combination of the minds of the defendants to file false individual income tax returns for 1943, and that the court based the conviction upon statements of the defendants made long after the alleged conspiracy had come to an end. We disagree. The District Court, in disposing of this contention, said:

> "Obviously the facts constitute beyond all doubt proof of a conspiracy. These three men * * * planned and carried out a scheme whereby, through their dummy corporations, their implements and tools, they were to and did receive $500,000 in un-accounted for income. This is the very essence of a conspiracy."

To this it will be enough for us to say that we have examined the record, and that it discloses evidence of a conspiracy between the defendants from early in 1943 when the defendants first conceived the idea of selling whiskey at over-ceiling prices up to the time when they filed their income tax returns in March, 1944. This will appear more clearly later on.

Fourth: Defendants' main contention is that the evidence was insufficient to sustain the conviction.

In the trial court, defendants admitted that they each had received over-ceiling payments from purchasers of whiskey which had not been reported in their original individual tax returns, and they contended that later in amended returns they reported income from their joint venture and paid the tax thereon. But they argued that these amended returns were erroneous; that the over-ceiling payments represented gross income, and if their legitimate expenses were deducted they actually suffered a loss on their illegal transactions.

The trial judge found that the defendants in fact owned, controlled and manipulated the affairs of the corporations as their tools for the realization of over-ceiling sales of whiskey which they diverted from the corporations to their own resources. This was an illegal joint enterprise. It was reported later as a joint enterprise and each defendant in his amended return accounted for what he then admitted he had received from the joint enterprise and received an additional assessment, which was paid. (There is nothing in the record to indicate that the tax paid was accepted in full payment of the liability or that it represented any compromise.) The court found that the evidence clearly showed a flagrant attempt to defeat taxes on some $500,000 of gross income.

Since the trial judge found the defendants guilty, we

must take that view of the evidence, with inferences reasonably and justifiably to be drawn therefrom, most favorable to the Government and accept as true all facts which the evidence reasonably tended to prove.

In the year 1943 defendants had very extensive dealings in wholesale whiskey sales in two different series of transactions involving whiskey obtained from two different sources. In both, sales were made through regular trade channels of corporations licensed to carry on such sales, with accurate records of all receipts and expenditures by the corporation used, showing sales at regular ceiling prices as established by Office of Price Administration. However, in both sets of transactions, in addition to the ceiling prices received by the corporate sellers, the defendants who owned or controlled these corporate distributors also received side payments in cash representing over-ceiling charges for the whiskey. The two corporate distributors through which all sales were channelled were:

1. Gary Wine and Liquor Corporation of Indiana. Rosenblum and Stryk bought all the stock in this corporation in 1939. Weiss was its attorney.

2. P. and M. Corporation of Illinois. The record stockholders of this were S. Prosterman who was record owner of 98 shares, and L. Mitteldorf, a brother-in-law of Rosenblum, who owned the remaining two shares.

Gary had handled whiskey distributed by J. Beam Company which required it to build up certain reserves of aged whiskey, represented by warehouse receipts. At the end of 1942, Gary had 547 barrels in reserve. Early in 1943, it bought 1,500 additional barrels, making small payments from corporate funds, and for the balance, Rosenblum and Stryk gave their personal notes in order not to impair the credit standing of the corporation.

The facts relating to the sales of this Beam whiskey were

established largely by stipulation. From April 19 to July 27, a total of 210 barrels and 6,584 cases of whiskey were sold through Gary for total invoices of $159,826, and Rosenblum and Stryk received a total of $99,799 in cash as side payments for these same sales. Four sales not covered by the stipulation were established by the evidence of the purchasers as follows:

		—Paid checks—		
	Bought	For regular invoice	Expense	Cash on side
Ackerman	215 bbls.	$13,144	$59,125	$78,230
"	100	7,040	30,000	35,459
Palffy	30	2,354	9,535	22,604
Ruby	114	6,313		24,000

The first three payments were made to Rosenblum or Stryk, but the fourth was to a different party, and there was no testimony to show that either of them received it. This last cash payment was made to Gardner, an officer of Beam which held the whiskey in warehouse. Nor was there anything in the stipulation or testimony of the purchaser connecting Weiss with any of the transactions involved in the sale of the Beam whiskey.

In 1943 negotiations were started for the purchase of the capital stock of a corporation which owned a large quantity of whiskey. These negotiations were carried on by Weiss who paid $50,000 for an option to buy Judge and Dolph, Ltd. of Wisconsin, engaged in the wholesale liquor business in Milwaukee and having franchises from the Seagram, Frankfort, and Fleishmann Companies. The stock of this corporation was owned by a holding company, Judge and Dolph of Illinois, which was in turn a subsidiary of Walgreen Drug Company. Weiss assigned his option to a newly formed corporation, Staple, Inc., incorporated as a holding company with himself and his wife as stockholders. Staple, Inc. paid the $370,000 balance of the $420,000 pur-

chase price agreed upon for the sale of the entire capital stock of Judge and Dolph, Wisconsin. The parties also agreed to and did pay off a $140,000 indebtedness to Judge and Dolph, Illinois. On August 2, 1943, Staple took over Judge and Dolph, Wisconsin with all its assets including its franchises, permits, licenses, accounts receivable, and 2,431 barrels and 5,037 cases of whiskey. The $50,000 paid by Weiss for the option was supplied by Rosenblum and Stryk from the proceeds of the side or over-ceiling payments on their sale of the Beam whiskey, and $334,000 of the $370,000 (paid by Staple, Inc.) was supplied by advance deposits for the sale of the Judge and Dolph whiskey. The balance was loaned by Weiss. (The business of Judge and Dolph, Wisconsin was later carried on under the name of Milwaukee Liquor Corporation, and Weiss moved to Milwaukee to operate the business.)

In order to market the Judge and Dolph whiskey the defendants arranged for the organization of the second distributor corporation, P. & M. of Illinois. A three-party contract was entered into between P. & M., Weiss, and Staple, Inc., providing for reimbursement for the purchase price of the Judge and Dolph, Wisconsin stock and for the bottling and sale of the whiskey. Although Prosterman and Mitteldorf were the record stockholders, Prosterman never had physical possession of the stock—98 of the one hundred shares of which stock were in his name. Rosenblum asked Prosterman to head the company and said he would be in a position to supply the liquor for it to handle. The arrangement was that Prosterman and Mitteldorf were to receive a commission for selling the whiskey at OPA ceiling prices. However, they made no sales themselves, referring all potential purchasers to Rosenblum. They never had either whiskey or certificates at their place of business. Sales were channelled through the corporation, and Prosterman and Mitteldorf received commissions there-

for which were paid to them by the corporation out of its receipts for sales at regular ceiling prices. The corporation's bank account of $10,000 was opened by Prosterman, Mitteldorf and Stryk—with the latter supplying the cash for it.

The defendants stipulated that sales of the whiskey acquired from Judge and Dolph, Wisconsin in the amount of 25,990 cases and 45 barrels were made through P. & M. for a total of $529,249 invoice price and that Rosenblum received an additional $313,036 in cash. During the year 1943 Rosenblum received the following amounts in cash as side payments on the sale of wiskey: $99,799, Beam, as stipulated; $136,293, Beam, as testified by purchasers; and $313,036, Judge and Dolph, as stipulated, or a total of at least $549,128. (This excludes an additional side payment to one Gardner which was not shown to have been turned over to Rosenblum and which—$24,990—Gardner testified was the regular invoice price to P. & M.) No report, as we have already observed, was made of the receipt of this over half million dollar income from the sale of whiskey in any of the original tax returns of Rosenblum, Stryk, or Weiss for the year 1943, and their accountant who made out their returns testified that they told him nothing about it at that time.

In March, 1944, Rosenblum appeared before the Alcohol Tax Unit apparently in connection with an investigation then being conducted in Ohio relating to the Ackerman purchases. He then made a statement as to his dealings in the 315 barrels of Beam whiskey for which the record shows his receipt of side payments of $78,230 and $35,000 in cash paid by Ackerman. He denied these cash payments—denied that he or Stryk had received any payment except the checks for the regular invoice price for the two lots of whiskey. Later, in May and June, 1945, Weiss alone first, and then Weiss and Rosenblum, and Weiss and Stryk,

appeared before the Intelligence Unit of the Bureau of Internal Revenue to testify as to their dealings in whiskey. In the first of these interviews, on May 16, Weiss described his early relations with Rosenblum and Stryk and his virtual partnership with them in the Gary business. This close relationship he said led up to their approaching him when they were considering the purchase of Judge and Dolph, Wisconsin, and his participation in negotiations leading to the purchase. He stated that in working out the details of the contract there was discussion that "there must be 'justification' for this whole picture in case inquiry should be directed against this transaction by the authorities, and on this basis many of the details * * were worked out * *. We had agreed in our conversation * * that we would pay that price which eventually would be computed out, but that any dollars and cents * * actually was to be reduced or increased to an even dollar figure so that the tracing would be difficult. * *"

Subsequently, Weiss stated that the "total price paid for the 116,509.83 gallons of whiskey (5,037 cases) paid by us to Judge and Dolph of Illinois $403,869.62 * * in addition to which we were to purchase the stock of the corporation for its net worth value which subsequently developed to be $30,068.88, and we agreed to pay off $140,000 * * owed by Judge and Dolph of Wisconsin to Judge and Dolph of Illinois."

Weiss further stated that in addition to the $50,000 Rosenblum and Stryk handed to him to pay for the option, they gave him $75,000 in federal bonds to secure a loan to use in paying the $140,000. "The money so received from Mr. Rosenblum and Mr. Stryk totalled $160,000."

During the course of the same series of interviews Rosenblum admitted the receipt of $363,000 in cash in excess of the P. & M. invoice prices which amounted to $974,279 on a series of sales. This $363,000 he said was paid over to

Staple, Inc., to be used in payment of the whiskey and capital stock of Judge and Dolph, Wisconsin and in reduction of the debt. He also stated that although he did not represent P. & M. in any way and had nothing to do with its operations or any share in its profits, he could guarantee delivery by it of any orders he took for the sale of liquor—that there was no agreement as to that, but an understanding.

Stryk stated that they intended to report the income for tax purposes but "it became such a hot potato we didn't know how to. We intended to do it this year (1945). At that time we didn't know how to work it out." In case of a sale by Milwaukee Liquor Corporation, he "got a third of it." He denied ever handling any of the overceiling cash but admitted putting packages given him by Rosenblum which he knew contained money into his safety deposit box.

In June, 1945, Weiss was living in Milwaukee and gave as his occupation "chairman of Milwaukee Liquor Corporation." (This was the successor to Judge and Dolph of Wisconsin which was, thus, still operating as a wholesale wine and liquor business.) He said he also maintained a law office in Indianapolis for "sketchy or remnant practice of law."

As a result of the investigation and interviews, Weiss, Rosenblum and Stryk all filed a delinquent partnership return for the year 1943, setting up gross receipts of $512,510 and ordinary net income of $142,279. The merchandise on which this was based was the 2,431 barrels and 5,037 cases of whiskey for which the net cost was stated to be $389,931. An explanation of the filing was attached to the return stating that it was to make clear that the transactions by Staple, Inc., were in fact those of Rosenblum, Stryk and Weiss.

Defendants cite the case of *Spies* v. *United States,* 317 U. S. 492. They claim that the evidence fails to show that defendants knew that they owed a tax and that without justifiable excuse they failed to report it. They insist that something more is required than the doing of the act proscribed by the statute. There must be proof of an evil motive to accomplish that which the statute condemns.

To be sure, to establish its case the Government must prove not only an attempt to wilfully defraud it but also that a tax in addition to what the taxpayer had already paid remains due and owing, *Gleckman* v. *United States,* 80 F. 2d 394, and *Tinkoff* v. *United States,* 86 F. 2d 868, but it is not necessary to prove an evasion of the entire amount alleged in the indictment; the proof is sufficient if it shows any substantial portion of the tax liability to have been wilfully evaded. *United States* v. *Schenck,* 126 F. 2d 702. See also *United States* v. *Johnson,* 319 U. S. 503, 517. Nor is direct proof of wilful intent necessary. It may be inferred from the acts of the parties, and such inferences may arise from a combination of acts. *Battjes* v. *United States,* 172 F. 2d 1, 5.

Defendants assert that they are entitled to their costs of the whiskey, $466,039.32, and their expenses in selling it, $145,506.07, and when these items are allowed, they had a loss of $99,035.37. They also claim that two exhibits[1] identified by the Government but introduced over the objection of the district attorney, show expense items for which they were not given credit. Hence they argue there was no evil motive or want of justification.

In this connection we note that P. & M., in its return, reported a gross income of $974,279 against which it

1. These exhibits A-13 and A-14 were schedules which defendants' accountant stated showed items of expense which he was instructed not to include in the Gary Corporation costs when he was making up its return. The items were not verified—there was nothing to indicate their source or accuracy—no basis was laid for their allowance, and the accountant did not profess to know anything about the authenticity or the truth of the items.

charged $840,961 as cost of goods. The only goods that P. & M. sold was the Judge and Dolph whiskey, hence the trial court could infer that the item of $840,961 included all legitimate charges in addition to the original cost of the goods.

The question of wilfulness is one of fact to be determined by the jury or the trial judge from all the circumstances, *Spies* v. *United States, supra,* 499; *Maxfield* v. *United States,* 152 F. 2d 593; *United States* v. *Lange,* 161 F. 2d 699; and *Battjes* v. *United States, supra.* So here, we have a deliberate omission from the return of income which each defendant subsequently admitted knowing should have been included in his return—a deliberate falsification of the return, and not just the default in filing return or paying tax which the court held, in *Spies* v. *United States, supra,* was insufficient of itself to sustain a charge under Sec. 145(b). A fraudulent return is always an attempt to evade a tax. *Rick* v. *United States,* 161 F. 2d 897, 898. After investigation started, each defendant filed an amended return disclosing a part of the income previously omitted. Under similar circumstances, the court, in *Cave* v. *United States, supra* (decided after the *Spies* case), held that the Government was not required to prove more than that there was wilfully unreported income to sustain a conviction under the statute. See also *Murray* v. *United States,* 117 F. 2d 40.

We conclude that there was sufficient evidence to sustain the court's finding that each defendant was guilty of an attempt to evade payment of his income tax by means of filing a false and fraudulent return. The writer is of the opinion that the court could infer that defendants who unquestionably acted in concert in their black market operations, also combined in their attempts to evade payment of taxes, and that intent to evade such taxes was one of their motives in concealing the income they received from the over-ceiling

prices of the sale of whiskey and omitting it from their returns. However, my colleagues do not agree, and have filed separate opinions as to the indictment charging conspiracy. Hence the judgments of conviction as to the three indictments charging the substantive offenses will be affirmed, and the judgment as to the indictment charging conspiracy will be reversed.

MAJOR, *C. J.* I concur in Judge Kerner's opinion in all respects except as it relates to the indictment which charges conspiracy, and as to this charge I would reverse. The substantive offense charged in each of the indictments other than the conspiracy indictment was that the defendants "did wilfully and knowingly attempt to defeat and evade." Not only was the case tried, but the conviction on these substantive offenses rests, on the theory that the defendants were engaged in a joint enterprise. Thus the government justifies the variance between the proof and the allegation of the indictments on the ground that the income described in the indictments as "dividends" was received as the fruits of a joint venture. The consolidation of the indictments for trial over the objection of the defendants is also justified, in part at least, upon the same premise. And throughout the memorandum of findings by the lower court runs the thought, both tacit and express, that the defendants were tried and that they were convicted as partners engaged in a joint venture or enterprise. It therefore seems plain that the defendants in the substantive indictments have been convicted as participants in a joint enterprise designed to "attempt to defeat and evade." In the conspiracy indictment they have been convicted of concerted action "to attempt to evade and defeat." Any difference between concerted action to commit an act and participation in a joint enterprise to commit the same act is not discernible to me. "A conspiracy is a partnership in crime." *United States* v. *Socony-*

Vacuum Oil Co., 310 U. S. 150, 253. And in my view, a joint enterprise conducted for an illegal purpose is likewise a partnership in crime. I think the judgment premised on conspiracy should be reversed because under the peculiar circumstances of the case it embodies the same crime as that based on the substantive charges.

A more conclusive reason for reversal, however, arises from the failure of the court to differentiate between the proof relevant to the substantive offense and that relevant to the conspiracy charge. I understand the government to concede that the conspiracy came to an end in March of 1944, when the defendants filed their alleged false and fraudulent returns for the calendar year 1943. In any event, the filing of such returns are the latest overt acts alleged (see overt acts 21, 22 and 23). Such being the situation, the admissions, statements and acts of the individual defendants made or performed after the termination of the conspiracy were not admissible and cannot be considered as proof of that charge. *Fiswick, et al.* v. *United States,* 329 U. S. 211, 215-217. The record unmistakably discloses, however, that the strongest and most convincing proof which the government offered related to statements made by the individual defendants in conferences with government officials which finally culminated in the filing of amended returns some two years after the termination of the conspiracy. Assuming this evidence was proper as admissions against interest, as I think it was, it could properly be considered only as to the substantive offense. The record shows conclusively, however, that this character of proof was utilized in support of the conspiracy charge. In the absence of such proof, I doubt if there is any proper support for the conspiracy conviction but, whether so or not, the fact is that this damaging testimony, inadmissible on the conspiracy charge, was relied upon to convict and is here relied upon by the government to sustain such conviction.

DUFFY, *Circuit Judge.* As I disagree in part with the opinion of Judge Kerner and am not in entire agreement with the opinion of Chief Judge Major, a brief separate opinion seems in order.

Viewing the evidence in the light most favorable to the government, together with all reasonable inferences to be drawn therefrom, I agree that the judgments of conviction must be affirmed in so far as they relate to the three indictments on the substantive offenses. However, as to the indictment charging conspiracy, I think there must be a reversal.

I can well understand the difficulty Judge Major has in ascertaining any real difference between the charges contained in the three indictments alleging substantive offenses aud the charge in the conspiracy indictment. At best only a very fine line can be drawn between the charges that these defendants participated in a joint adventure to attempt to defeat and evade the federal income tax and the charge that by concerted action they agreed to attempt to defeat and evade such tax. This is the kind of a case, in my opinion, where it is an abuse of the judicial process to charge conspiracy when practically the same offense has been charged in substantive counts.

I recognize that the old doctrine of merger of conspiracy in the substantive crime has not obtained in this country (*Pinkerton, et al.* v. *United States,* 328 U. S. 640, 650), and that it is only an identity of offenses which is fatal (*Gavieres* v. *United States,* 220 U. S. 338, 342); yet the facts in this case bring it at least within the shadow of the rule stated in the *Pinkerton* case, *supra* (p. 643):

> "* * * There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. * * *"

Nevertheless I am convinced, albeit reluctantly, that under the Supreme Court cases cited by Judge Kerner the conspiracy indictment was good as against the attack made that it was practically identical to the indictments charging substantive offenses, and thus did not adequately charge the crime of conspiracy. In the *Pinkerton* case, *supra,* the court said (p. 644): "Moreover, it is not material that overt acts charged in the conspiracy counts were also charged and proved as substantive offenses." In that case the court held in effect that conspiracy is equivalent in law to aiding and abetting. The substantive offenses here charged were attempting to defeat and evade the tax. The charge that the defendants entered into an agreement to make such an attempt was a statement of a separate offense under the decisions cited.

Courts have protested vigorously against the current and perhaps growing habit to indict for conspiracy in addition to the substantive offense, and have pointed out that such procedure often constitutes a serious threat to a fair administration of justice. *Krulewitch* v. *United States,* 336 U. S. 440, 445-446. As far back as 1925 the Conference of Senior Circuit Judges pointed out the dangers of such practice. And any judge with trial court experience knows that the charge of conspiracy in an indictment is often used at the trial for the purpose of getting evidence into the record which would otherwise be inadmissible, and that the trial judge is often powerless to prevent such abuse. As was stated in the *Krulewitch* case, *supra* (p. 453), "But the order of proof of so sprawling a charge is difficult for a judge to control."

Whenever in the estimation of the trial judge the conspiracy count has been added to the indictment for the purposes hereinbefore stated, he can dampen the prosecutor's enthusiasm for such practice by imposing a sentence on the conspiracy count which will be concurrent with that

imposed on the substantive count or counts; but he cannot entirely avoid the evil of opening the door at the trial for evidence inadmissible except for the conspiracy charge.

I agree with Judge Major that the conviction for conspiracy was based almost entirely on statements made by defendants long after the termination of the conspiracy and upon the amended tax returns filed by the defendants nearly two years after the conspiracy had ended. Certainly such statements and the filing of the amended returns were not made pursuant to and in furtherance of the objectives of the conspiracy.

The only possible basis for the consideration of such evidence on the conspiracy charge was the theory adhered to by some courts (see: *United States* v. *Krulewitch,* 167 F. (2d) 943, 948; *United States* v. *Goldstein,* 135 F. (2d) 359; *Murray* v. *United States,* 10 F. (2d) 409) that there necessarily was an agreement among the alleged conspirators to conceal the violation after as well as before the illegal plan is consummated. I believe this theory has now been definitely discarded. *Krulewitch* v. *United States,* 336 U. S. 440, 443.